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519398—43

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 829

ESTATE OF ROBERT LYONS HAGUE, DECEASED, CITY BANK FARMERS TRUST COMPANY AND WALTER E. GODFREY, EXECUTORS, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

There were two opinions of the Board of Tax Appeals, one relating to the tax year 1936 (R. 46–60), reported at 45 B. T. A. 104, the other relating to the tax years 1937–1938 (R. 61–74), which is not officially reported. The opinion of the Circuit Court of Appeals (R. 288–292) is reported at 132 F. 2d 775.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 4, 1943 (R. 292–293).

Petition for a writ of certiorari was filed March 15, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether the Circuit Court of Appeals erred in sustaining the determination of the Board of Tax Appeals that the unexplained deposits made in the accounts of Robert Lyons Hague, now deceased, in two banks during each of the three tax years, 1936–1938, constituted taxable income.

STATUTES INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> * * * * * *
>
> SEC. 41. GENERAL RULE.
>
> The net income shall be computed upon the basis of the taxpayer's annual account-

> ing period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * *

Sections 22 (a) and 41 of the Revenue Act of 1938, c. 289, 52 Stat. 447, are identical with the like numbered provisions of the 1936 Act.

STATEMENT

This case involves the income tax liability for the years 1936, 1937, and 1938 of Robert Lyons Hague, who died March 8, 1939 (R. 47), and whose interests are represented in this case by the petitioners, his executors. The Board of Tax Appeals determined Hague's income from his bank deposits, charging him with income in the amount of all deposits made during the year which were unidentified and unexplained as to source. The record showed that Hague used his unexplained deposits for purposes of his own pleasure and personal needs. The executors made no effort to prove that the unexplained deposits were of capital items. The pertinent facts found by the Board may be summarized as follows:

During the three years, 1936 to 1938, inclusive, Hague was head of the Marine Shipping Department of the Standard Oil Company of New Jersey, and he maintained a personal bank account with the National City Bank of New York, and from and after May 1, 1936, another personal bank account with the Chase National Bank (R. 47–48, 62). Hague's annual salary from the Standard Oil Company of New Jersey during those years was: 1936, $45,454.56 (R. 47); 1937, $50,060.04 (R. 62); 1938, $55,000.08 (R. 65); but $6,062.64 (R. 48), $6,743.64 (R. 62), and $7,333.56 (R. 65) of those respective salaries were withheld by the company and deposited to Hague's credit in the "Employees Thrift Fund." The company also paid Hague further compensation of $12,072.95 in 1938 (R. 65).

In addition, Standard Oil of New Jersey paid Hague $61,000 in 1936 for "Strike Expense", which Hague deposited in his bank account, but for which he made no accounting to his company; it also paid him $31,849.40 for traveling expenses and $3,838.32 to reimburse him for other expenditures which he had made for the company. Apparently Hague deposited only $7,500 of these latter receipts in any bank. (R. 48–49.) Similarly, he received from his company in 1937—in addition to his salary and to some traveling expenses and miscellaneous expenditures reimbursed—amounts aggregating $168,058, of which he deposited not more than $116,-

777 (R. 62–63). In 1938 he received like payments of $50,191, practically all of which he deposited in the banks together with about $7,250 of sums he received for traveling expenses (R. 66–67).

Hague borrowed from banks or from persons not related to him and deposited $66,877.41 in 1936 (R. 49), $77,129.65 in 1937 (R. 64), and $106,869. 49 in 1938 (R. 67). In the latter year he deposited $2,153.33, part of which he received as payment of a loan, part as damages for an injury to his yacht and part as collections which he later paid over to the "Greater New York Fund" (R. 68).

In 1936 Hague deposited $9,510.70 and in 1937 he deposited $11,654.35, representing the proceeds of stock which he had sold (R. 49, 64). In all three years he borrowed money from his brother which he deposited. In 1936 the amount was $39,000; in 1937 it was $19,800; and in 1938 it was $41,715. (R. 50, 63–64, 67.) In each instance, on the same day or soon after borrowing from his brother, Hague deposited a like sum *in cash*[1] in his brother's account at another bank (R. 92, 110). In 1936 he received from his wife $35,250 and deposited $32,750, reimbursing her at or about the same time by deposits to her bank account (R. 50).

[1] By this curious procedure taxpayer accomplished a significant result—he deposited funds in his own bank account, meantime camouflaging his deposits as "funds" (loans) from his brother. Actually he was probably depositing money obtained from some other (and undisclosed source). The same result was achieved by taxpayer's similar borrowings from his wife in 1936, reimbursed to her in cash.

Hague was accustomed to carry substantial amounts of cash, and upon going home at night would at times give his butler sums in varying amounts up to $10,000 to keep for him until morning. He paid some of his obligations in cash, among them the butler's salary and frequently the apartment rent and other hotel charges. Hague would sometimes hand his chauffeur several thousand dollars in cash to deposit for him. (R. 52.)

Although the nature of Hague's receipts were shown only as above set forth, he deposited in his two checking accounts $529,880.45 in 1936, $409,542.18 in 1937 and $506,932.56 in 1938 (R. 50, 64, 68). He lived expensively (R. 268, 276, 115–134, 206–226A, 227–252) and withdrew and disposed of so much that he accumulated nothing and died insolvent (R. 94). His checking accounts were active and were often overdrawn, though he made deposits sufficient to maintain them. Many of his deposits and withdrawals were in cash. (R. 186–190, 255–259, 269–272). In 1936 Hague wrote checks aggregating $309,450.23 to designated payees, mostly for personal expenses (R. 51–52, 115–134); in 1937 such checks amounted to $291,631.97 (R. 65, 206–226A); and in 1938 to $377,543.67 (R. 68, 227–252). On checks payable to cash he withdrew $213,424.69 in 1936 (R. 51–52, 197), $127,003 in 1937 (R. 65, 268) and $143,362.17 in 1938 (R. 68–69, 276).

Hague and his wife filed a joint income tax return for 1936 reporting a net taxable income of $24,593.69. The Commissioner determined a deficiency by including an additional $343,192.61, the amount of Hague's unexplained year 1936 bank deposits. (R. 15, 53.) The Board of Tax Appeals redetermined the deficiency by deducting, from the aggregate 1936 deposits, all reported income items on which federal income tax had been paid, all deposits which had been identified as nonincome items and all so-called loans from Hague's wife and brother. Upon exclusion of these items Hague's "unidentified and unexplained bank deposits" during 1936 stood at $266,883.28 (R. 57), and this sum the Board held must be treated as additional and unreported income to Hague during the tax year (R. 60).

The Board similarly arrived at the amount of Hague's taxable income for the years 1937 and 1938.[2] Hague had reported net taxable income of $47,718.19 for 1937; the deficiency determined by the Commissioner was based on the addition of $94,456.19 to the reported income (R. 25, 70); and the deficiency was redetermined by the Board in the same amount.[3] Reported taxable income for

[2] Hague and his wife filed separate tax returns for the years 1937 and 1938.

[3] Actually Hague's unidentified bank deposits for the year 1937 exceeded $94,456.19 (see R. 267) but as the deficiency notice had charged Hague with additional income of only $94,456.19 he was merely charged with that amount under the pleadings. (See R. 71.)

1938 was $60,706.18; the Commissioner determined the deficiency by adding $373,373.96 (R. 34–35, 70); and, as redetermined by the Board, the deficiency was computed on the addition of $240,407.28 to the reported income (R. 73).

The Circuit Court of Appeals affirmed the decision of the Board that Hague was chargeable with additional income for the years 1936, 1937, and 1938 in the respective amounts of $266,883.28, $94,456.19, and $240,407.28.

ARGUMENT

The decision of the court below affirming the determination of the Board of Tax Appeals was correct and there is no conflict of decisions.

1. The source of Hague's funds which he deposited in his bank accounts during the taxable years was purely a question of fact. Yet petitioners offered no proof as to the source and character of the unexplained deposits. The Board, therefore, had no alternative save to hold that Hague was taxable upon these unexplained and unidentified deposits. *Mauch* v. *Commissioner,* 113 F. 2d 555 (C. C. A. 3rd); *Calafato* v. *Commissioner,* 124 F. 2d 187 (C. C. A. 3rd), affirming *per curiam* 42 B. T. A. 881; *Hoefle* v. *Commissioner,* 114 F. 2d 713 (C. C. A. 6th); cf. *Burnet* v. *Houston,* 283 U. S. 223, 228; *Commercial Corp.* v. *N. Y. Tank Barge Corp.,* 314 U. S. 104, 110–111. Certainly there was "a rational basis for the con-

clusions approved by the administrative body." *Miss. Valley Barge Co.* v. *United States,* 292 U. S. 282, 287. See also *Hulburd* v. *Commissioner,* 296 U. S. 300, 306; *Helvering* v. *Lazarus & Co.,* 308 U. S. 252, 255. A brief survey of the evidence may high light the latter point.

Hague's salary from the Standard Oil Company of New Jersey never exceeded $55,000.08, yet he deposited $529,880.45 in his two bank accounts in 1936, $409,542.18 in 1937, and $506,932.56 in 1938 (R. 50, 64, 68). In determining the deficiencies upon the basis of Hague's bank deposits the Board of Tax Appeals has eliminated all the additional sums which Standard Oil paid Hague for "Strike Expense," or otherwise, which were deposited in Hague's bank accounts. The Board also eliminated his salary payments, whether they were all deposited in taxpayer's bank accounts or not (R. 56–57), and it made like allowances for all items of income which Hague had reported upon his return, for the deposited proceeds of the few shares of stock which he sold, for money borrowed and deposited in his accounts, including even the sums obtained from his wife and brother (R. 56–57, 72–73). The Board also eliminated a small amount of insurance which Hague received, as well as certain collections he made and deposited and later disbursed to the "Greater New York Fund." (R. 56–57, 72–73.) In short, the Board made allowance for every

identifiable item and in addition made a further allowance for the deposited checks of Hague's wife and brother. The result was an unexplained residue of deposits which the Board held must be treated as income.

As the Board noted (R. 58) there was no evidence "that the cash deposits represented the redeposit of amounts previously withdrawn," and no claim and no evidence to substantiate a claim that the unexplained deposits represented gifts, property or money held in trust, or money or the proceeds of property acquired in prior years.

Yet Hague, who had no known substantial investments, lived expensively and on a scale which only his unexplained bank deposits made possible. This is clear merely from the checks which Hague drew each year in favor of designated payees, the most of them for obviously personal expenditures.[4] Upon such a record, lacking any evidence that the unexplained deposits were not income, the Board of Tax Appeals properly held Hague taxable upon the amount of the unexplained deposits. Cf. *Burnet* v. *Houston, supra,*

[4] Summary classifications of the disbursements which Hague made by check during each of the tax years (with the cash withdrawals shown separately) are in evidence. (R. 196–197, 268, 276.) These can be verified by reference to R. 115–134, 206–226A and 227–252. See also the part of decedent's federal estate tax return appearing at R. 143–150 and particularly R. 163–179 for data serving to identify most of the payees of Hague's checks set forth at R. 115–134, 206–252.

p. 228; *Houston Natural Gas Corp.* v. *Commissioner,* 90 F. 2d 814, 817 (C. C. A. 4th), certiorari denied, 302 U. S. 722. The Circuit Court of Appeals therefore correctly upheld the Board's determination.

2. There is no conflict between the decision of the Circuit Court of Appeals and any of the decisions which petitioners have cited, and we do not understand that petitioners claim a conflict of decisions. They suggest (Pet. 8) that the question involved is one of far-reaching importance because, so they assert (Pet. 9), it results in a "veritable confiscation of property" in violation of the Constitution. The answer is that they have not proved a confiscation, and in the absence of proof of confiscation they cannot claim a violation of the Fifth Amendment. Cf. *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337.

Helvering v. *Taylor,* 293 U. S. 507, is not in point. There, the evidence had established that the Commissioner's apportionment of a total cost, between preferred and common stock acquired in a single transaction, was erroneous, and this Court observed (p. 515) that "confessedly" Taylor did not owe all the tax which the Commissioner had asserted. Since the taxpayer "confessedly" did not owe the full amount of tax, this Court upheld the action of the Circuit Court of Appeals in remanding the case to the Board for the taking of evidence to show whether a fair apportionment might be made and, if it could, the correct amount of the resulting tax.

Here, however, there was a complete failure of proof by the executors as to the nature of Hague's unidentified bank deposits. The executors cannot make a virtue of their own complete failure of proof. *Burnet* v. *Houston, supra.*

CONCLUSION

The decision of the court below is correct, and there is no conflict of decisions. The petition should be denied.

Respectfully submitted.

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